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No. 94-952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

PAN AMERICAN WORLD AIRWAYS, INC., and
ALERT MANAGEMENT SYSTEMS, INC.,
Petitioners,

v.

JUDITH A. PAGNUCCO, DONA BARDELLI BAINBRIDGE,
MOLENA A. PORTER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS

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* There has been no change in the Rule 29.1 listing contained in the petition for certiorari.

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REPLY BRIEF FOR PETITIONERS

The legal standards announced by the court of appeals and presented for review by Pan Am do not vanish because the plaintiffs, in their opposition, ignore them and present a one-sided version of the evidence that they were allowed to argue to the jury while Pan Am's defenses were excluded.

A. The Wilful Misconduct Standard. The court below held that all evidence of the carrier's good faith belief that the x-ray procedure complied with the ACSSP and would not result in probable death or injury can be excluded under the criminal law doctrine that ignorance of the law is no defense. Until that decision, it had been settled law that the carrier's state of mind is the critical

ingredient of wilful misconduct under Article 25 of the Warsaw Convention and that even an *intentional* violation of a safety rule is not wilful misconduct unless committed in knowing or reckless disregard of probable death or injury.

Plaintiffs barely mention this ruling and wrongly pretend that it does not conflict with the large body of federal and state decisions cited by Pan Am.[1] They have also omitted any reference to the decisional law of other nations or to the uniformity of liability standards that was reintroduced by the Hague Protocol. Similarly, they do not take issue with the fact that virtually every activity of a carrier is subject to a body of safety rules so pervasive that almost any accident will afford plaintiffs an opportunity to allege a violation of a safety rule.[2]

Plaintiffs' principal point is that the jury charge contained the tried-and-true standards of wilful misconduct (Opp. 26). As the dissent showed (App. 70a), a proper jury charge becomes "meaningless" when the carrier's side of the story—evidence of its state of mind—is excluded. By implanting mistake-of-law doctrine in the determination of wilful misconduct under Article 25, the court below has introduced a broad bar against evidence that would explain the basis for the carrier's action and its understanding as to whether that action would probably

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[1] While plaintiffs state that "Pan Am has failed to cite a single case in conflict with the Second Circuit's holding . . ." (Opp. 28), the conflicting case law is laid out at pp. 11-14 of the petition.

[2] While plaintiffs argue that Pan Am's position that the x-ray procedure complied with the ACSSP is "contradicted by the clear language of the regulations" (Opp. 28), this contention ignores, *inter alia*, the fact that, *in five inspections at London and Frankfurt prior to Lockerbie, the FAA had found the x-ray procedure to be in compliance with the ACSSP* (*e.g.*, J.A. 4077-86). Moreover, following the disaster, the FAA did not cite Pan Am for using x-ray inspection in violation of the ACSSP (J.A. 3011-13); instead, it revised the ACSSP to clarify its requirements (J.A. 4125-26).

result in death or injury. Neither the court below nor the plaintiffs can explain how that result can be other than to gut the established criteria for wilful misconduct and to turn safety rules violations into wilful misconduct *per se*. Review by this Court is warranted to preserve the principal purpose of the Convention—to place limitations on an air carrier's liability—and to restore the standard for lifting those limitations that has been historically applied by U.S. and foreign courts.

B. The Burden of Proving Causation. The court below ruled that when the actual cause of a disaster is unknown or sharply disputed—that is, when there is a deficit of proof of actual causation—a plaintiff may compensate for that deficit by introducing extensive evidence on a diverse array of alleged misconduct and then ask the jury to infer from the "totality of the circumstances" that some act or omission by the carrier must have been the cause of the disaster (App. 30a-31a). This ruling introduces *res ipsa loquitur* as a substitute for proof that specific acts of the carrier not only amounted to wilful misconduct, but were themselves a proximate cause of the disaster.

Until the ruling below, the Convention had required plaintiffs, when seeking to set aside its liability limitations, to prove that specific acts or omissions amounting to wilful misconduct were a cause of the disaster. Thus, foreign courts and commentators have concluded that the limits of the Convention may not be lifted when the cause of the accident is not proven; and two circuits have held that *res ipsa loquitur* may not be used as a substitute for actual proof of causation in a wilful misconduct case under Article 25 (Pet. 20-22).

Plaintiffs and the court below erroneously rely on *In re Korean Airlines Disaster*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 112 S. Ct. 616 (1991), which holds only that circumstantial evidence (as opposed to eye-witness

testimony) may be offered to prove causation under Article 25. In that case, the plaintiffs did have a specific theory as to how the crew's misconduct had caused the aircraft to be shot down and they did not argue that Korean Airlines should be found liable no matter how the disaster occurred.[3] *See* 932 F.2d at 1478-81.

Plaintiffs and the court below ignore the point that the disparate acts introduced here to prove causation either had nothing to do at all with Flight 103 or no link to any specific theory of causation, such as the Air Malta theory.[4] Under the rubric of "totality of the circumstances," the court below has eliminated the requirement that plaintiffs must prove that specific acts of wilful misconduct caused the crash.

C. The Appellate Fact-Finding. The court below held that it was "harmless error" to allow plaintiffs to brand as a lie Pan Am's claim that the FAA had approved the

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[3] Moreover, the carrier in that case was unable "to suggest an innocent explanation for the disaster." 932 F.2d at 1481. Here, in contrast, the courts below precluded Pan Am's efforts, through its own witnesses and through cross-examination of plaintiffs' experts, to suggest ways in which the bomb might have been planted for which Pan Am would not be responsible (App. 31a-34a).

[4] Plaintiffs add confusion by asserting that "other wrongs or acts" are admissible to prove "motive, intent, plan, or knowledge" (Opp. 29). Pan Am objected to the evidence on two grounds—its relevance to "motive, intent, plan, or knowledge" and its relevance on causation (*e.g.*, J.A. 406-08). The trial court overruled both objections (J.A. 1439-43), and thus did not give a limiting instruction (*see Huddleston* v. *United States*, 485 U.S. 681, 691-92 (1988)) that would have prevented plaintiffs from urging the jury to conclude that the carrier should be deemed responsible "however [the bomb] bag got on the airplane" (J.A. 3529). Moreover, contrary to plaintiffs, *Tug Ocean Prince, Inc.* v. *United States*, 584 F.2d 1151 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979), does not support the admission of plaintiffs' evidence of misconduct not related to the Air Malta theory. In *Tug Ocean Prince*, the "totality of the circumstances" consisted of multiple acts by defendant, each of which was shown to be causally related to the accident.

x-ray procedure, while preventing Pan Am from presenting the factual basis for its position and even barring the alleged liar from meeting the charge. In support of its harmless error ruling, the majority purported to find "overwhelming evidence" (App. 21a) of wilful misconduct in other episodes. Characterizing these other incidents as proof of wilful misconduct required the court below to reject Pan Am's testimony showing that the carrier had taken special security steps in response to the Helsinki warning, that the x-ray operator had searched for radios in light of the Toshiba warning,[5] that, contrary to a security consulting firm, the British government had approved the x-ray screening of unaccompanied bags,[6] and that the alleged backdater of the Helsinki warning did not backdate (Pet. 23-25).

Plaintiffs' only response is that it is "nonsense" to say that "the court of appeals resolved disputed questions of fact in derogation of the rights of trial by jury" (Opp. 30). But there is no attempt to rebut Pan Am's factual demonstration that the court of appeals did usurp the jury's function. Review by this Court is warranted because the safeguards provided by rehearing en banc and

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[5] Plaintiffs' assertion (Opp. 13) that Kurt Maier, the x-ray operator for Flight 103, was not given the Toshiba warning is contradicted by Maier's testimony at trial (J.A. 3382-83). They also argue (Opp. 13 & n.17) that Maier "recanted" his testimony that there was no radio in the bags x-rayed for Flight 103, but at trial Maier was asked: "Were there any radios in those things that you x-rayed?" and he answered: "No" (J.A. 3392-93). Plaintiffs' claim that Maier "recanted" this testimony is based on a rewriting of his testimony on cross-examination. Significantly, when arguing before the jury that had heard all of Maier's testimony, plaintiffs did not place this revisionist interpretation on Maier's testimony.

[6] In a burst of invention, plaintiffs claim that Pan Am violated the British regulations by not matching passengers and bags (Opp. 23-24). James Jack, the Principal Aviation Security Advisor for the British Department of Transport, answered "No" when asked: "Were any rules or regulations in effect on December 21, 1988, that required foreign air carriers to match each bag with a passenger that was on a particular flight" (J.A. 289).

review by this Court are impaired when appellate panels insulate important and erroneous rulings of law from further review through result-oriented fact-finding.

D. Plaintiffs' Treatment of the Evidence. The rulings presented by questions 1 and 2 of the petition are rulings of law that drain Article 25 of the Warsaw Convention of its meaning. This Court is being asked to reinstate the correct legal standards under Article 25 and to direct the court of appeals to apply those standards to this record. Thus, there is no occasion now, or on the merits, for the Court ever to entertain the jury argument that plaintiffs have presented in the first 24 pages of their opposition.[7]

Moreover, plaintiffs' rehash of their closing argument highlights the basic unfairness of the trial. Here, the jury was precluded from hearing evidence showing Pan Am's state of mind in adopting and implementing the x-ray procedure, evidence showing that British security officials had approved x-ray as the means for detecting terrorist bombs in unaccompanied bags, and all expert evidence regarding terrorism or bombing. The unfairness of the trial in this case is not in any respect diminished by plaintiffs' point that Pan Am did not file a Rule 50 motion contesting the sufficiency of plaintiffs' evidence because the problem is that the trial court did not allow Pan Am to present its own case on state of mind and did not confine plaintiffs' case to proper evidence on causation.[8] If

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[7] Parts of plaintiffs' argument have no evidentiary support at all. Plaintiffs claim that unaccompanied interline bags represent the "greatest danger" of bombing (Opp. 10). The courts below, however, excluded Pan Am's expert evidence that the greatest danger actually comes from passengers who serve as unwitting couriers of bombs, a bombing technique utterly inconsistent with the Air Malta theory. The trial judge instead instructed the jury that there was "no evidence" to support the very assertion plaintiffs make here (App. 26a).

[8] There is, of course, no requirement that a party move under Rule 50 as a condition for appealing the use of erroneous legal standards in admitting and excluding evidence. *See, e.g., Kotteakos*

those prejudicial errors had not been committed, Pan Am would likely have prevailed in the trial of this case; for, despite the one-sided rulings that crippled Pan Am's intended defense, the jury twice reported itself deadlocked before reaching its verdict.

E. The Proffer. Plaintiffs argue that Pan Am failed to make an offer of proof regarding the evidence that it had received approval from the FAA to implement the x-ray procedure. They made the same argument to the court of appeals, but that court announced the legal rulings now challenged, while "assuming without deciding that defendants sufficiently preserved their objection . . ." (App. 16a-17a). Thus, the judgment below and the standards announced by the court below are squarely presented to this Court.

Furthermore, the facts set out in note 20 of the petition and in the dissenting opinion spike any challenge to the sufficiency of Pan Am's proffer. For instance, while the majority below (App. 14a) stated that Richard Cozzi's proffered testimony was inadmissible hearsay (Opp. 18), that is plainly wrong. Counsel for Pan Am responded to a hearsay objection by stating that Cozzi's testimony was being proffered to show the state of mind of Pan Am's management when it adopted the x-ray procedure: "Your Honor, the state of mind is at issue here" (App. 50a). As the dissent demonstrated,[9] when introduced for that purpose, Cozzi's testimony was *not* inadmissible hearsay.

While the majority below was prepared to assume that the proffer on Daniel Sonesen's proposed testimony was

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v. *United States*, 328 U.S. 750, 765 (1946) ("The inquiry [in determining prejudicial error] cannot be merely whether there was enough to support the result . . . .").

[9] App. 64a-66a, *quoting, e.g., United States* v. *Rubin*, 591 F.2d 278, 283 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979). *See also* 4 J. Weinstein & M. Berger, Weinstein's Evidence, ¶ 801(c)[01], at 801-94 to -99 (1994).

adequate, the dissent, to remove any doubts whatsoever, quoted the first proffer of Sonesen's testimony that was made *in writing* (App. 68a), and quoted many of the oral proffers made by Pan Am's counsel during the trial (App. 48a-50a, 70a-79a). Further, in a brief submitted during the trial, Pan Am for the second time set out *in writing* the substance of Sonesen's proposed testimony (J.A. 410). Plainly, nothing more is required.[10]

In sum, new rules were announced by the court of appeals in justifying the exclusion of Pan Am's defense, and the record shows that the rejected defense was squarely presented to the trial judge.[11] Indeed, that defense was proffered so often that the trial judge complained that he was rejecting it for the "425th time" (App. 83a).

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[10] Rule 103, Fed. R. Evid., only requires that the "substance" of the excluded evidence be "made known" to the trial judge, unless that judge directs that a proposed witness be called and make his proffer from the witness stand, which the district court did not do here.

[11] Plaintiffs' remaining attacks on Sonesen's proposed testimony, *i.e.*, that it is too vague or contradictory (Opp. 18-19, 27), go to credibility and weight, and not to admissibility. (Their attacks also ignore Cozzi's crisp recollection of the facts, which corroborates Sonesen's proffered testimony.) Plainly, unless defendants are to be stripped of their right to jury trial, a court does not have a "right to reject testimony dealing with a person's state of mind because it deems the testimony incredible or lacking in persuasive force" (App. 66a). *See Cheek* v. *United States*, 498 U.S. 192, 203 (1991).

CONCLUSION

A writ of certiorari should issue to review the judgments of the United States Court of Appeals for the Second Circuit in these cases.

Respectfully submitted,

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